TRACTORS MALAYSIA BHD. v. CHARLES AU YONG

[F.C. (Suffian L.P., Salleh Abas & Abdul Hamid F.JJ.) January 13 & February 19, 1982]

Kuala Lumpur — Federal Court Civil Appeal No. 156 of 1977]

Bankruptcy — Application to set aside bankruptcy notice — Counterclaim — Whether could have been set up in original claim — Bankruptcy Act, 1967, s. 3(1)(i).

In this case the appellants had brought an action against the respondents for the balance of the price of goods sold to them. Judgment by default was obtained by the appellants against the respondents. Subsequently the respondents brought an action against the appellants and this case was part-heard. As the respondent did not satisfy the default judgment in the first action, the appellants served a bankruptcy notice on him. The bankruptcy notice was set aside in the High Court under section 3(1)(i) of the Bankruptcy Act, 1967, which provides among other things that a bankruptcy notice may be set aside if the debtor satisfies the court that he has a counterclaim which equals or exceeds the amount of the judgment debt or sum ordered to be paid and which he could not have set up in the action in which judgment was obtained. The appellants appealed.

Held, allowing the appeal: (1) the essence of the claim of the respondent in the second action did not amount to a counterclaim which he could not have set up in the first action in which the appellants obtained judgment within the meaning of section 3(1)(i) of the Bankruptcy Act, 1967. On the contrary he could have set it up in the first action if his solicitors had carried out his alleged instructions;

(2) there was plenty of time between the judgment and the notice in which the respondent could have applied to the court to have the default-judgment in the first action to be set aside and yet he did not do so;

(3) the second action was tantamount to a collateral attack upon the final decision of a court of competent jurisdiction.

Cases referred to:-

(1) *Hunter* v. *Chief Constable of the West Midlands Police* [1981] 3 W.L.R. 906.

(2) *Stephenson* v. *Garnett* [1898] 1 Q.B. 677, 680-681.

(3) *Reichel* v. *Magrath* (1889) 14 App. Cas. 665, 668.

The following cases were also cited in argument: *In re A Debtor* [1914] 3 K.B. 726, 730; *Re A Debtor* [1947] 116 L.J. Chancery 1413, 1416; *Re Fong Fung Loon* [1933] M.L.J. 299.

FEDERAL COURT.

K.T. Ngiam for the appellants.

Jagjit Singh for the respondents.

Cur. Adv. Vult.

Suffian L.P. (delivering the judgment of the Court): This is an appeal from a decision of Harun J. setting aside a bankruptcy notice served by the appellants on the respondent.

Two actions are involved between the same parties.

In the first action, Suit No. 1186 of 1975, the appellants (whom we shall refer to as the petitioning creditors or simply creditors) claimed against this debtor (whom we shall refer to as the judgment debtor or simply debtor) $211,800, being the balance of the price of goods (tractors) sold and delivered by the judgment creditors to the debtor at the debtor's request. That suit was filed in Kuala Lumpur and served on the debtor's solicitors on September 2, 1979. On September 8, appearance was filed. By letter of September 23 (page 23 of the appeal record) the creditors gave notice that unless a defence was served on them within 48 hours they would enter judgment against the debtor. No defence was served. On October 16 the creditors obtained judgment by default.

Then on December 17 the debtor filed the second action, Civil Suit No. 192 of 1975, against the creditors — in the Malacca High Court. (This action has been part-heard and further hearing will be held this year).

The debtor did not satisfy the default-judgment in the first action. So on April 1, 1976, the creditors served on him Bankruptcy Notice No. 120 of 1976. This was however withdrawn on November 29 because of some defects. They then served a second bankruptcy notice (No. 108 of 1977) on the debtor on February 24 the following year, 1977.

As was earlier said, on application by the debtor the learned judge set aside the notice, clearly on the ground that the debtor had satisfied him under section 3(1)(i) of the Bankruptcy Act No. 55 of 1967 — clearly so from the notes of argument in the appeal record though we have not been supplied with the learned judge's grounds. That section provides among other things that a bankruptcy notice may be set aside if the debtor satisfies the court that he has a counterclaim which equals or exceeds the amount of the judgment debt or sum ordered to be paid and which he could not have set up in the action in which the judgment was obtained.

That section, be it noted, requires the debtor to satisfy the court as to three things:

(a) that he had a counterclaim;

(b) the counterclaim equals or exceeds the sum ordered to be paid; and

(c) he could not have set up the counterclaim in the first action in Kuala Lumpur.

We regret that we are unable to agree with the learned judge.

In our opinion, the essence of the claim of the debtor in the second action filed in Malacca does not amount to a counterclaim which he could not have set up in the Kuala Lumpur action in which the creditors obtained judgment within the meaning of section 3(1)(i) of the Act. On the contrary he could have set it up in the Kuala Lumpur action if his former solicitors had carried out his alleged instructions.

There has been a continuing business relation between the creditors and debtor relating to tractors of which the creditors were and are dealers, and Mr. Jagjit Singh for the debtor before us said that the tractor which was repossessed by the creditors on October 1, 1975, was one of the tractors with which the two parties had business dealings, and in our opinion what was alleged by the debtor in the second action as the basis of his claim could have been the subject of a counterclaim in the first.

As we understand it, the first action in Kuala Lumpur and the second action in Malacca are connected, and the latter is the aftermath of the former and founded on the damage which the debtor claims

he suffered as a result of the creditors resuming possession of the tractor. The matters raised in the statement of claim in the second action in Malacca would therefore appear to be nothing less than an attempt by the debtor to reopen the main suit in which the debtor filed no defence and made no counterclaim, and judgment in default was entered against him. The debtor's allegation against his former solicitors (that they neglected to file a defence and generally look after his interest) might give him a remedy against them, but does not affect his position vis-a-vis the judgment creditors.

The debtor made no attempt to apply to the court to set aside the default-judgment, though he had plenty of time to do so. That judgment as earlier stated was obtained as long ago as on October 16, 1975; the first bankruptcy notice was issued on April 1, 1976, and after its withdrawal the second bankruptcy notice was not served until February 24, 1977. So there was plenty of time between the judgment and the first notice and also between the two notices in which the debtor could have applied to the court to have the default-judgment in the first action to be set aside; and yet he did not do so.

In our judgment the Malacca action is tantamount to a collateral attack upon a final decision of a court of competent jurisdiction. Since writing this judgment we have come across a decision of the House of Lords on this very point in *Hunter* v. *Chief Constable of the West Midlands Police*[1] where a civil case was started obviously to try and overrule a decision of a criminal court. There Lord Diplock said at page 914:

"My Lords, collateral attack upon a final decision of a court of competent jurisdiction may take a variety of forms. It is not surprising that no reported case is to be found in which the facts present a precise parallel with those of the present case."

He then cited with approval the following passages as expressing the principle to be followed by the courts:

"... the court ought to be slow to strike out a statement of claim or defence, and to dismiss an action as frivolous and vexatious, yet it ought to do so when, as here, it has been shewn that the identical question sought to be raised has been already decided by a competent court." (*per* A.L. Smith L.J. in *Stepbenson* v. *Garnett* [1898] 1 Q.B. 677, 680-681).

"... I think it would be a scandal to the administration of justice if, the same question having been disposed of by one case, the litigant were to be permitted by changing the form of the proceedings to set up the same case again." (*per* Lord Halsbury L.C. in *Reichel* v. *Magrath* (1889) 14 App. Cas. 665, 668).

In our judgment, this appeal must be allowed. Accordingly we set aside the learned judge's order and in its place substitute an order that the notice of bankruptcy be restored.

The debtor to pay costs here and below, and the judgment creditors' deposit to be returned to them.

Appeal allowed.

Solicitors: *Nik Hussain, Ibrahim, Tan & Abdullah; Jagjit Singh & Co.*

LOOT TING YEE v. TAN SRI SHEIKH HUSSEIN BIN SHEIKH MOHAMED & ORS.

[F.C. (Suffian L.P., Salleh Abas & Abdul Hamid F.JJ.) January 15 & February 19, 1982]

[Kuala Lumpur — Federal Court Civil Appeal No. 12 of 1981]

Practice and Procedure — Contempt of court — Application for committal for contempt dismissed in High Court and Federal Court — Application for leave to appeal to Yang di-Pertuan Agong — Whether there is right of appeal — Whether decision was one as to effect of Constitution — Whether decision was on a criminal matter — R.H.C. 1980, O. 52 — Courts of Judicature Act, 1964, s. 74(3)(a).

In this case the applicant had applied to the High Court to commit the respondents, who were members of the Education Service Commission, for alleged contempt of court. The application was dismissed in the High Court and in the Federal Court — See [1982] 1 M.L.J. 142. The applicant thereupon applied for leave to appeal to the Yang di-Pertuan Agong.

Held: (1) the decision of the learned judge in this case was in a criminal matter and therefore there is no right of appeal beyond the Federal Court;

(2) the alleged contempt in this case was a criminal contempt consisting of words or acts alleged to obstruct or tending to obstruct or interfere with the administration of justice;

(3) the fact that the application was made under Order 52 of the Rules of the High Court, 1980 and that if committed the respondents would be kept in a civil prison at the expense not of the Government but of the applicant did not make any difference.

Cases referred to:-

(1) *O'Shea* v. *O'Shea and Parnell, ex parte Tuohy* (1890) 15 P.D. 59.

(2) *Ambard* v. *A.G. for Trinidad and Tobago* [1936] A.C. 322.

(3) *Re Abdul Aziz's Application* [1962] M.L.J. 64.

(4) *Public Prosecutor* v. *Lee Ah Keh & Ors.* [1968] 1 M.L.J. 22.

(5) *In re Pollard* (1868) 5 Moore N.S. 111; 16 E.R. 457.

The following cases were also cited in argument: *Lee Chow Meng* v. *Public Prosecutor* [1979] 2 M.L.J. 267; [1979] 1 W.L.R. 1463, 1465; *Amand* v. *Home Secretary and Minister of Defence* [1943] A.C. 147; *Osman bin Mat Isa & Ors.* v. *Superintendent of Prison, Alor Star* [1974] 1 M.L.J. 189.

FEDERAL COURT.

Karpal Singh for the appellant.

Lim Beng Choon (Senior Federal Counsel) for the respondent.

Cur. Adv. Vult.

Suffian L.P. (delivering the judgment of the Court): This is an application by the appellant for conditional leave to appeal to His Majesty from a judgment of this court.

The appellant is a teacher at Sekolah Rendah Jenis Kebangsaan (China) Naam Kheung, Batu 3½, Jalan Cheras, Kuala Lumpur. He was ordered to go on transfer to Sekolah Rendah Jenis Kebangsaan (China) Chung Hwa, Jerteh, Trengganu. He refused to comply with the transfer order. He appealed to the education authority to cancel the order, but was not successful. On April 11, 1980, the Secretary-General of the Ministry of Education directed him to present himself to the Headmaster of the school in Jerteh as early as possible. He again refused.